

programming providers, Congress's intent in enacting the set-aside obligation will be undermined. The Commission should reject the arguments of the DBS providers on this point.

III. THE DBS PROVIDERS' PROPOSALS TO LIMIT THE SET-ASIDE OBLIGATION TO 4 PERCENT OF TOTAL CAPACITY SHOULD BE REJECTED.

SBCA and various DBS providers uniformly take the position that the obligation to set aside capacity for noncommercial use should be limited to 4 percent of a provider's capacity.¹⁸ They provide no reasoned explanation for why the obligation should be so limited. There is no suggestion that reservation of a higher percentage of capacity would present technical difficulties for DBS providers, or even that the additional capacity is currently filled with other programming.¹⁹ The DBS providers argue only that, despite its impressive growth in just the past few years, the DBS industry is still

¹⁸ See, e.g., SBCA Further Comments, pp. 4-5; DirectTV Supplemental Comments, pp. 5-8; Primestar Further Comments, p. 13; USSB Further Comments, p. 7.

¹⁹ SBCA suggests that there may not be sufficient noncommercial programming of national interest to fill 4 percent of channel capacity. See SBCA Further Comments, pp. 4-5. Under the terms of the statute, DBS providers may not exercise editorial control to bar programming they deem to be of insufficient interest to a national audience. See Act § 25(b)(3). In any event, if there were currently an inadequate supply of noncommercial programming that qualified for the set-aside, this would not be a reason for reducing the set-aside obligation below 7 percent. Any portion of the set-aside capacity that cannot immediately be used by a qualified program provider may be used by the DBS provider in the interim. Act § 25(b)(2).

in a "nascent" state and should therefore be subject to minimal regulation.

The Commission should reject the DBS providers' arguments. Congress explicitly gave the Commission the authority to set the reservation in a range from 4 to 7 percent, giving the agency the flexibility to vary the requirement according to circumstances. See H.R. Rep. No. 102-862, supra, at 100 ("The four to seven percent reserve gives the Commission the flexibility to determine the amount of capacity to be allotted."). The conferees emphasized that the channel capacity of a DBS system should be a key factor in the Commission's choice of the reservation requirement percentage:

The conferees intend that the Commission consider the total channel capacity of a DBS system in establishing reservation requirements. Accordingly, the Commission may determine to subject DBS systems with relatively large total channel capacity to a greater reservation requirement than systems with relatively less total capacity.

Id.²⁰ It is apparent that Congress intended that systems with larger channel capacity be subject to a higher percentage capacity reservation than small systems.

The DBS providers do not argue that the set-aside should be limited to 4 percent because their channel capacity is small. Indeed, they could not credibly make such an argument. At the time Congress was considering Section 25(b), the only DBS

²⁰ See also S. Rep. No. 102-92, 102d Cong., 1st Sess. 92 (1991); H.R. Rep. No. 102-628, supra, at 124.

system in operation, PrimeStar, planned to offer 10 channels initially. See S. Rep. No. 102-92, 102d Cong., 1st Sess. 16 (1991). The capacity of current DBS providers is far greater.²¹ The April 28 APTS/PBS Comments explained why the reserved capacity requirement should be set at 7 percent. As described in those comments (see pages 3-4 & n.4), the major DBS providers today offer over 150 channels of video programming. Advances in digital compression technology will provide even greater capacity in the near future. See April 28 APTS/PBS Comments, pp. 3-4 & n.4. Moreover, recent moves toward consolidation in the DBS industry suggest that there will ultimately be only a few large DBS providers.²²

In view of the large channel capacities of today's DBS systems, it is entirely appropriate for the Commission to set the reservation requirement at the upper end of the range provided by Congress, i.e., 7 percent. There is certainly no basis for setting a uniform 4 percent requirement. Because no DBS provider has offered a sound justification for a lower percentage, the Commission should apply the 7 percent requirement to the entire industry.

²¹ See, e.g., Colman & Schlosser, "PrimeStar Arms for Battle," Broadcasting & Cable (Mar. 3, 1997), at p. 44 (beginning April 20, PrimeStar is expanding to 160 channels).

²² This includes the recent declaration of bankruptcy by AlphaStar and the announcement of an agreement between News Corp. and PrimeStar Partners. See Wall Street Journal, May 27, 1997, p. B10.

If an individual DBS provider subsequently can make a special case for a lower percentage, e.g., because it is a new entrant that is starting out with a relatively small amount of channel capacity, then the Commission could grant a temporary waiver of the 7 percent requirement and allow that provider to satisfy a lower percentage requirement (but not less than 4 percent) until it is able to expand capacity to the current capacity levels of major DBS providers. This approach would be consistent with Congress's intent to provide the Commission with flexibility to choose a required level within the 4 to 7 percent range.

The DBS providers' united front on the proposal for a 4 percent requirement reflects an understandable economic desire to maximize profits by obtaining the lightest possible set-aside obligation.²³ However, they have not provided a persuasive legal justification for setting the requirement at that low level. The Commission instead should set the set-aside

²³ The set-aside capacity available for noncommercial programming should increase whenever the total capacity of a DBS system increases. Several parties suggest that computation of the set-aside capacity available on a particular DBS system should occur only once a year or even every two years. See, e.g., SBCA Further Comments, pp. 9, 11; DirecTV Supplemental Comments, pp. 6-7 n.12; Tempo Satellite Comments, p. 7 (recommending reassessment of capacity every two years). Such delay in making increased capacity available for noncommercial uses would frustrate Congress's intent that a percentage of total capacity be provided. There is no reason why the increased capacity should not be made available to noncommercial users as soon as it exists.

Certificate of Service

I, Tina T. Butler, hereby certify that copies of the foregoing "Reply Comments of Association of America's Public Television Stations and the Public Broadcasting Service" in the Direct Broadcast Satellite proceeding have been mailed this 30th day of May, 1997, by United States first class mail, postage prepaid to the following:

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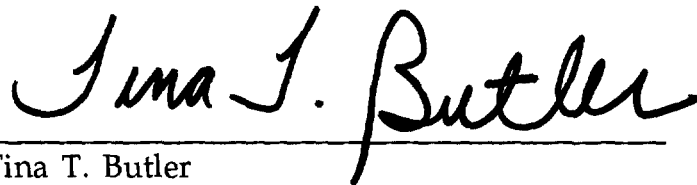
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A handwritten signature in black ink, reading "Tina T. Butler". The signature is written in a cursive style with a large, stylized "T" and "B".

Tina T. Butler